Supreme Court, U. S.
FILED
MAY 7 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1632

NICHOLAS BIANCO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. LA ROSSA
Attorney for Petitioner
522 Fifth Avenue
New York, New York 10036
(212) 687-4100

GERALD L. SHARGEL
Of Counsel

8719

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

In The

Supreme Court of the United States

October Term, 1975

No.

NICHOLAS BIANCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Nicholas Bianco, prays that a writ of certiorari issue to review the judgment and opinion entered on April 8th, 1976, by the United States Court of Appeals for the Second Circuit, in the proceeding entitled *United States of America, Plaintiff-Appellee against Nicholas Bianco, Defendant Appellant,* Docket No. 75-1244.

OPINION BELOW

The judgment and opinion of the Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at page 1a.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on April 8th, 1976. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether in a criminal prosecution for failure to file income tax returns for successive calendar years, the Government must prove with reasonable certainty the petitioner's net worth at the beginning of *each* year for which petitioner is prosecuted?

STATUTE INVOLVED

Title 26, United States Code, Section 7203 provides as follows:

> "§7203. Willful failure to file Return, supply information, or pay tax.
>
> Any person required under this title to pay any estimated tax or tax, required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016),

> keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

STATEMENT OF THE CASE

Petitioner, Nicholas Bianco, was convicted in the United States District Court for the Eastern District of New York, Platt, J., of five counts of violating Title 26, United States Code, Section 7203, for his alleged failure to file an income tax return for the years 1967 through 1971.

Utilizing the "cash expenditure" method of proof, the Government sought to establish that during the prosecution years, petitioner had earned income sufficient to require the filing of federal income tax returns. The "cash expenditure" theory of proof, a variant of the net worth method of proof, required the Government to establish with reasonable certainty the taxpayer's opening net worth in order to provide a basis on which to properly assess the inferential source of monies expended or increase in net worth. *Holland v. United States,* 348 U.S. 121 (1954); *Taglianetti v. United States,* 398 F.2d 558, 562 (1st Cir. 1968).

In this case, the Government attempted to show that petitioner was without accumulated assets prior to January 1st, 1967, the first calendar year which became the subject of this prosecution. In this regard, the Government proved that an attorney, who specialized in collection matters, could not satisfy a $400 judgment obtained against petitioner in September of 1965 (A165-172, A200).[1] Additionally, the Government proved that in December of 1966, petitioner's automobile was repossessed by the General Motors Acceptance Corporation (GMAC) (A222). Furthermore, the Government was allowed to prove that petitioner did not file income tax returns for the years 1963 through 1966. Failure to file in three of these years (1963 through 1965) was admitted to support the inference that petitioner had not earned income sufficient to require the filing of returns and, therefore, could not have accumulated any capital (A471).

The Government's proof of "no resources" at the beginning of 1967 was vigorously attacked by the defense. The defense established that at the time petitioner was alleged to have been without assets in 1966, he was spending monies which evidenced a rather comfortable lifestyle (A383-385). In the court below, petitioner argued that this evidence negatived the Government's assertion that petitioner was without assets at the start of the first prosecution year, 1967. The Court of Appeals, however, dismissed this assertion by stating that:

> "Such evidence . . . does not tend to establish the existence of assets of any kind, since the jury could well have believed that Bianco was simply living from hand to mouth, spending whatever income he had at that point." (7a).

1. The letter "A" refers to the petitioner's appendix filed in the United States Court of Appeals for the Second Circuit.

One further factual point deserves mention. The Government's case was entirely circumstantial. There was no direct showing of a source of income which was not reported. There was some evidence which the Court of Appeals described as "hardly conclusive" that petitioner was self-employed by the Easy Floor Waxing Company during these years. Additionally, there was some equivocal evidence that petitioner physically received some monies which were described as interest on a $10,000 loan. The Court of Appeals stated, however, that:

> "We need not hold on the state of the record in this case that such evidence of a 'likely source' would be sufficient by itself to relieve the prosecution of the duty to negate probable sources of income. . . ." (9a).

REASONS FOR GRANTING THE WRIT

There are, it is submitted, two cogent reasons for this Court to grant the petition for certiorari. These two reasons are based upon the fears expressed by Mr. Justice Clark in *Holland v. United States*, 348 U.S. 121 (1954). In condoning the use of the "net worth" method of proving income tax violations, this Court recognized the danger of such proof insofar as the Government's case might well succeed on something less than proof beyond a reasonable doubt.

Petitioner first submits that the Government's proof failed to establish with reasonable certainty petitioner's net worth at the beginning of 1967. It is submitted that the Government's portrayal of petitioner as a man who had no significant assets in the pre-prosecution years was far too sketchy. It is further submitted that if the Government were to utilize this method of proof, it was incumbent upon them to prove in far more detail the state of Bianco's lifestyle prior to the prosecution years in order to effectively negate the possibility that petitioner had accumulated a cash hoard. Where, as here, the Government showed only that a relatively small judgment went uncollected and that a car had been repossessed at the very time when petitioner purchased jewelry for an amount in excess of that judgment, and purchased a new automobile a short time after the first one was repossessed, does not sufficiently expose the state of petitioner's finances. In *Friedberg v. United States,* 348 U.S. 142 (1954), the Government's proof focused on a twenty-year history of defendant's finances preceding the tax years in question. There, the Government relied upon judgments, admissions of net worth and amounts of previous income. There, without question, the defendant's prior financial condition was placed before the jury in such a manner as to make it highly unlikely that the defendant had accumulated a cash hoard. In the case at bar, the opposite is true. At the end of the Government's case, it was clear that petitioner had accumulated assets.

The second point which merits review relates to petitioner's claim that there was a complete lack of evidence by which the jury could assess petitioner's net worth at the beginning of each of the prosecution years. *Dupree v. United States,* 218 F.2d 781

(5th Cir. 1955). The Government's proof, in effect, casually treated the five calendar years in question as one period during which petitioner allegedly spent money which he derived from taxable income. Petitioner herein suggests that it was necessary for the Government to show opening net worth as to each of these years so that the jury could properly determine whether the expenditures were earned in that year or had come from income accumulated in another prosecution year. In other words, if the Government's proof was sufficient as to the year 1967, there was no basis on which to find that the monies spent in 1968 were not derived from unreported income in 1967.

This Court, in *Holland v. United States, supra,* recognized this problem. In reviewing the net worth theory of proof, this Court made the following observation:

> "The statute defines the offense here involved by individual years. While the government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year, the taxpayer may be convicted on counts of which he is innocent." 348 U.S. at 129.

While some cases may provide sufficient proof on which a finding could be made that the non-reported income was

allocable to a particular year, no such proof exists in the case at bar. Absent such proof, the jury was left to merely assume sufficient gross income was earned in each year which would require petitioner to file. An assumption of this nature is entirely inconsistent with the presumption of innocence.[2]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: May 7th, 1976

Respectfully submitted,
s/ James M. La Rossa
Attorney for Petitioner

GERALD L. SHARGEL
Of Counsel

2. This phenomenon is especially acute in the instant case because the petitioner received four consecutive one-year terms of imprisonment on each of the prosecution years, 1967 through 1970. In addition, petitioner was fined $10,000 on each count equalling a total fine of $50,000.

APPENDIX

OPINION AND JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 385—September Term, 1975.

(Argued November 3, 1975 Decided April 8, 1976.)

Docket No. 75-1244

UNITED STATES OF AMERICA,

Appellee,

v.

NICHOLAS L. BIANCO,

Appellant.

Before:

HAYS, MULLIGAN and MESKILL,

Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a jury trial, Thomas C. Platt, *Judge*, finding the defendant guilty of five counts of willfully failing to file income tax returns for the years 1967 through 1971.

Affirmed.

CHARLES E. BROOKHART, Attorney, Tax Division, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney, Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews, Robert E. Lindsay, Attorneys, Tax Division, Department

of Justice, Washington, D.C., of Counsel), *for Appellee.*

GERALD L. SHARGEL, New York, New York (James M. LaRossa, LaRossa, Shargel & Fischetti, New York, New York, of Counsel), *for Appellant.*

MESKILL, *Circuit Judge:*

Nicholas L. Bianco appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a jury trial before Thomas C. Platt, *District Judge*, of five counts of willfully failing to file income tax returns for the years 1967 through 1971 in violation of § 7203 of the Internal Revenue Code of 1954, 26 U.S.C. § 7203.

I.

Bianco claims on this appeal that the government failed to prove that he had sufficient income in the disputed years to require his filing of returns. Specifically, he asserts that the government failed to prove with "reasonable certainty" that his cash expenditures during the years in question had not been made either from assets on hand prior to those years or from non-taxable sources of income.

The government prosecuted the case by the "cash expenditure" method of proof, a variant of the "net worth" method, which permits circumstantial proof of a defendant's taxable income in cases where the prosecution is unable directly to show specific items of such income. These two indirect methods of proof have been explained and distinguished by the First Circuit in *Taglianetti* v. *United States*, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd.*, 394 U.S. 316 (1969), as follows:

> "The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailable against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year." (footnotes omitted).[1]

In the case at bar, the government proved. and Bianco does not contest, that he made expenditures in each prosecution year far in excess of the amount which, if the figure had been derived entirely from taxable income in that year, would have required him to file returns.[2] Nor does Bianco contest the prosecution's proof that no returns were filed by him in any of the prosecution years. His sole challenge to the sufficiency of the government's case rests upon his contention that it failed to prove that the expenditures were "not attributable to the resources at hand at the begin-

---

1 The quoted passage from *Taglianetti* was quoted with approval by this Court in *United States* v. *Fisher*, 518 F.2d 836, 841 (2d Cir. 1975), *cert. denied*, —— U.S. ——, 44 U.S.L.W. 3358 (December 16, 1975).

2 In tax years 1967 through 1971, the evidence indicated that Bianco expended $4,284.68, $5,924.99, $9,898.25, $8,916.49 and $10,217.01 respectively. In each of the first three years, 1967, 1968 and 1969, taxpayers with gross income in excess of $600 were required to file tax returns. For the final two years of the prosecution period, because he had become married, the threshold gross income figure applicable to Bianco was $2,300. See Pub. L. 91-172, Title IX, § 941(a), 83 Stat. 726, amending § 6012 of the Internal Revenue Code of 1954, 26 U.S.C. § 6012.

ning of the year or to non-taxable receipts during the year." More specifically, Bianco contends that the government failed to satisfy the requirement of "the establishment, with reasonable certainty, of an opening net worth." *Taglianetti* v. *United States, supra,* 398 F.2d at 564.

The "reasonable certainty" requirement is derived from the Supreme Court's opinion in *Holland* v. *United States,* 348 U.S. 121, 132 (1954), a case which was prosecuted on the net worth rather than the cash expenditure theory and which involved a prosecution which attempted to show a specific deficiency rather than only income over the threshold amount necessitating the filing of tax returns. Nevertheless, the government properly concedes in the present case that the "reasonable certainty" standard applies in cash expenditure cases, albeit in a slightly different manner from that discussed in *Holland.*

> "In a typical net worth case, as *Holland,* precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof . . . makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures." *Taglianetti* v. *United States, supra,* 398 F.2d at 565; *see also United States* v. *Fisher, supra,* 518 F.2d at 842 n. 7.

In the instant case, the government attempted to show that Bianco's beginning resources were non-existent and thus could not have contributed at all to his expenditures during the tax years. To that effect, Special Agent Louis Nahmias testified about his investigation into Bianco's

financial background. He testified that he had examined the records of the Kings County Clerk's Office, the county in which Bianco had lived from 1962 through 1972, but could find no record of any real estate in Bianco's name. He testified further that he had circulated letters to approximately 100 banks in Brooklyn, all of which responded that they had no assets or accounts in Bianco's name. Nahmias further testified that he checked with a brokerage house in order to determine whether or not Bianco had had any securities holdings or dealings, which inquiry also produced negative results. He also testified that he made inquiries of insurance brokers, doctors, schools, hospitals, the telephone company, the electric company, and an attorney who had performed legal services for Bianco during the prosecution years. Finally, there was testimony that investigation had been made of the probate records in Providence, Rhode Island, where Bianco's family lived. Those records revealed no inheritance from either Bianco's mother or father, both of whom had passed away earlier. An interview with Bianco's sister was also conducted in Providence. These investigations failed to reveal any assets held by Bianco *at any time,* prior to or during the prosecution years.

The Government's case, however, did not rely entirely upon Agent Nahmias' testimony about his fruitless search for assets. It introduced Bianco's 1962 income tax return which reported only a modest wage or salary income for that year. There was also evidence introduced that Bianco had not filed tax returns for the years 1963, 1964 and 1965, the government thereby attempting to create the inference that the failure to file in those years negated the probability that Bianco had had sufficient income then to have accumulated assets on which to have lived during

the later prosecution years.[3] Further, Samuel S. Sezzen, Esq., an attorney who has specialized in collection matters since 1936, testified that in the early part of 1966 he used his normal "general procedure" but was unable to locate any assets from which to satisfy a $436.40 judgment entered earlier against Bianco.[4]

The totality of this evidence clearly was sufficient for the jury to have concluded that Bianco had insufficient assets at the beginning of the prosecution period to have supported his expenditures in any of those years. Bianco presented no defense and offered no evidence in this case. His major contention on appeal appears to be that the prosecution failed to negate the possibility of a so-called "cash hoard," although there is not one speck of evidence to indicate that Bianco had such a cache or where it might

---

3 Bianco challenges the admission into evidence of his failure to file returns in those years as an unjustifiable use against him of his presumption of innocence. *See United States* v. *Schipani*, 362 F.2d 825, 829-30 (2d Cir.), *vacated and remanded*, 385 U.S. 372 (1966). In *Schipani* this Court described the use of such evidence as "unnecessary" given the complete and thorough exhaustion of sources of non-taxable income but failed to find its use a cause of reversal. Furthermore, in *Schipani*, the government's reliance upon the failure to file to show no income during those years appeared to have been inconsistent with proof tending to show that Schipani had had income in those years. There was no inconsistency in this case, there having been no proof of any income or expenditures made by Bianco in 1963, 1964 or 1965.

In any event, the admission of such evidence finds support, if not acceptance, in decisions of the Supreme Court and three other circuits, *see Smith* v. *United States*, 348 U.S. 147, 157 (1954); *United States* v. *Caserta*, 199 F.2d 905, 907 n. 5 (3d Cir. 1952); *Hanson* v. *United States*, 186 F.2d 61, 66-67 (8th Cir. 1950); *United States* v. *Skidmore*, 123 F.2d 604, 610 (7th Cir. 1941), *cert. denied*, 315 U.S. 800 (1942), and, even assuming its admission to have been error, we find insufficient prejudice to the defendant to justify reversal here.

4 Although Sezzen's testimony did not reveal what, other than the service of an unfruitful restraining notice upon a bank near Bianco's last known address, that "general procedure" was, the fact that Sezzen discovered no assets was some evidence from which the jury could infer that they did not exist.

have come from. He points to the evidence elicited on the cross-examination of several prosecution witnesses that he had been making lavish expenditures during the latter part of 1966, just before the beginning of the prosecution period. Those expenditures, in the form of a down payment on an automobile and the "wining and dining" of a female acquaintance, according to Bianco, show that the government's case was fatally defective. Such evidence, however, does not tend to establish the existence of assets of any kind, since the jury could well have believed that Bianco was simply living from hand to mouth, spending whatever income he had at that point.

Of course, as in any criminal prosecution, the defendant is under no obligation to prove any particular set of facts, including the existence of a non-taxable source, such as a "cash hoard" from which his expenditures were made. But once the government has introduced sufficient evidence from which the jury could conclude with reasonable certainty that no such assets existed, the defendant remains silent at his own peril. *Holland* v. *United States, supra*, 348 U.S. at 138-39; *United States* v. *Pencsi*, 452 F.2d 217, 220-21 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); *United States* v. *Shipani, supra*, 362 F.2d at 830.

Much of what we have said with respect to the government's duty to establish a lack of adequate funds from which the expenditures could have been made applies with equal or greater force to Bianco's contention that the government failed sufficiently to negate all other possible sources of non-taxable income during the prosecution years. As mentioned above, the government conducted a thorough investigation, including a search of the Providence, Rhode Island probate records and an interview with Bianco's sister in Rhode Island, in an attempt to discover whether or not he had been the recipient of any gifts, loans or inheritances. The investigation revealed no such non-

taxable income nor any "leads" which the government neglected to investigate.[5] "Once expenditures are established, the government cannot be expected to conduct an exhaustive nationwide investigation when the defendant supplies no relevant leads as to where he got the money he admittedly spent." *United States* v. *Penosi, supra,* 452 F.2d at 220.

Bianco's major attack upon the government's investigation into possible sources of non-taxable income centers upon its failure to negate the possibility that Bianco had received an inheritance in Brooklyn or that his wife had received any inheritances. These *post hoc* suggestions, however, do not render insufficient the search that was conducted. There is nothing in the record to suggest that Bianco had any relatives in Brooklyn. To the contrary, it was apparent that Bianco's roots and family were located in Providence, Rhode Island. Similarly, from all that appears in the record, there was no reason for the government to have suspected that his wife had received an inheritance of any kind. To require the government to conjure up testators who may have contributed to Bianco's cause, without some suggestion as to who those persons may have been, would create a burden which the prosecution could never meet.

Finally, it should be noted that the government introduced evidence from which the jury could have inferred that Bianco was receiving income from taxable sources during the prosecution years. While that evidence was hardly conclusive, it was sufficient to show at least one "likely source" of taxable income. The government introduced a loan application, an insurance claim and a lease application, all of which were made by Bianco during the prosecution years and which indicated that Bianco was self-employed by the Easy Floorwaxing Company.[6] Further, there was direct testimony by a Manhattan businessman that Bianco personally had arranged for and delivered to him a $10,000 loan. The loan transaction carried with it weekly interest payments of $250 and has been properly characterized as a "loanshark" transaction. Although the testimony again was not conclusive with respect to how much of the interest payments went into Bianco's pockets as opposed to those of his associates, the jury was entitled to infer that Bianco's involvement in the transaction was not entirely altruistic and that at least part of the $2,000 interest paid during an eight week period in 1967 was income to him.

We need not hold on the state of the record in this case that such evidence of a "likely source" would be sufficient by itself to relieve the prosecution of the duty to negate probable sources of non-taxable income, *see* ***Holland*** v. *United States, supra,* 348 U.S. at 138, but merely that such evidence, together with the evidence of the government's fruitless search for sources of non-taxable income, is sufficient to support an inference by the jury that the expenditures proved were attributable to currently taxable income. *Cf. United States* v. *Massei,* 355 U.S. 595 (1958).

---

5 It should be noted that Agent Nahmias' investigation of insurance companies uncovered a non-taxable $3,000 payment to Bianco in 1969 resulting from the theft of his automobile. That payment was properly credited against his expenditures in that year. Similarly, another non-taxable insurance payment of $1,750 to Bianco in 1968 was discovered and credited against that year's expenditures.

6 In the lease application, made in 1968, it was stated that Bianco had income of $125; it is not clear whether that was a weekly or monthly income.

Bianco claims that Agent Nahmias' testimony that he could not, after investigation, confirm the existence of the Easy Floorwaxing Company renders worthless Bianco's admissions of employment during the tax years. While these admissions are hardly conclusive when uncorroborated, they are nevertheless sufficient independent evidence since they were made under circumstances having nothing to do with the commission or investigation of the crime charged. *Cf. Warszower* v. *United States,* 312 U.S. 342, 347-48 (1941).

II.

During the course of Agent Nahmias' testimony at trial, it was revealed that the Internal Revenue Service ("IRS") had maintained a "mail watch" on Bianco's incoming mail for almost ten years.[7] It was further revealed that the evidence of at least one of the expenditures proved at trial had been derived from the mail cover. Bianco neither objected to such evidence nor did he move to suppress it at trial; on this appeal he challenges its admission on the ground that the mail cover was an unreasonable search and seizure in violation of the Fourth Amendment. He seeks to circumvent the rule announced in *United States* v. *Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966), that generally "the failure to make proper objection before the trial court to the admission of the challenged evidence forecloses review of the asserted error" by claiming that this Court's decision in *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3429 (Jan. 16, 1976), significantly changed, after his trial, the prior law with respect to the constitutionality of mail covers, which prior law would have made objection at trial futile. *See United States* v. *Indiviglio, supra*, 352 F.2d at 280 and n. 7. We disagree and hold that Bianco's claim cannot be raised at this stage in the proceedings.

In *Ex parte Jackson*, 96 U.S. 727 (1878), the Supreme Court made clear that the Fourth Amendment prohibited the warrantless opening of sealed letters and packages

---

7 Agent Nahmias was never asked to define what a "mail watch" was in the context of this case when he admitted that that technique was employed against Bianco. We shall assume, since there is no hint to the contrary in the record and since Bianco's brief in this Court so assumes, that the "mail watch" or "mail cover" involved only the inspection and recording of the names and return addresses on the envelopes in his incoming mail.

except in cases involving incoming international mail, where the enforcement of the customs laws justifies an incursion into the sanctity of such mail. This Court, in *United States* v. *Costello*, 255 F.2d 876, 881 (2d Cir. 1958), *cert. denied*, 357 U.S. 937 (1958), *pet. for rehearing denied*, 358 U.S. 858 (1958), interpreted the *Jackson* opinion as necessarily implying that "without offense to Constitution or statute writing appearing on the outside of envelopes may be read and used." Bianco asserts that the *Costello* opinion made clear that any objection he might have made at trial would have been futile.

After Bianco's trial, this Court approved a mail cover employed by the IRS in *United States* v. *Leonard, supra*. The mail cover there involved the copying and recording of the postage meter numbers on all incoming mail from Switzerland which bore no return address. The object of that mail cover was to match the postage meter numbers on the envelopes with meter numbers registered to Swiss banks in an attempt to discover which American citizens might be using secret Swiss bank accounts to hide unreported income. In affirming the IRS's use of such a broad mail cover, which monitored all incoming Swiss mail to previously undetermined addresses, Judge Friendly commented that "[i]t may well be that, in these days of increased concern for the protection of privacy, the statement in *Costello* should not be read as an absolute, permitting, for example the Government to copy the outside of every envelope received by every citizen." *United States* v. *Leonard*, *supra*, 524 F.2d at 1087. Bianco's assertion now is that Judge Friendly's comment significantly changed the law of this Circuit with respect to the validity of mail covers by indicating that the Court will now hear objections to excesses in such investigative techniques where previously it would not. We disagree.

Judge Friendly's dicta in *Leonard* stated what should by now be obvious: that any particular investigative means, including mail covers, are subject to abuse and excesses, and that such excesses *might* serve to distinguish this Court's prior decision that the reading of the outside of an envelope does not violate any constitutional principles. The *Costello* case certainly was not to the contrary. Indeed, *Costello's* main thrust involved a determination as to whether or not the mail watch in that case violated federal statutes prohibiting interference with the mails, and thus, inferentially, violated standards of due process and fundamental fairness by securing a conviction on the basis of evidence derived from means which violated the law; its implication was that the Court would not sanction the use of such unlawful investigative means regardless of whether or not the mail watch was a "search" within the Fourth Amendment's domain. The Court, of course, found no infirmities, either statutory or constitutional, in the mail watch considered there. Thus Judge Friendly's opinion in *Leonard* did nothing to alter the *Costello* rationale; it merely recognized that most appellate decisions, including *Costello,* are capable of being distinguished on their particular facts. Significantly, *Leonard* expressed doubt, citing Mr. Justice Harlan's concurring opinion in *Katz* v. *United States,* 389 U.S. 347, 360 (1967), that the reading of the outside of envelopes in incoming international mail could violate anyone's "reasonable expectation of privacy" and thus the Fourth Amendment, since such mail is subject to inspection and opening in aid of the enforcement of the customs laws. Given that doubt, the comment in *Leonard* to the effect that an overbroad mail cover *may* not pass constitutional muster obviously refers to concerns falling outside of the Fourth Amendment's scope, that is, due process concerns existing long before Bianco's trial.

We of course express no opinion as to whether or not the mail cover in this case involved such excesses or abuses that would offend principles of due process or any statutory prohibitions. Bianco's remedy was to move to suppress or to object to any evidence derived from the mail cover. Having failed to do so, he cannot now assert his challenges to the mail cover in this Court. *United States* v. *Indiviglio, supra.*

III.

Bianco's final claim, raised below and decided against him after a full evidentiary hearing, is that the federal tax prosecution was derived from testimony given by him in a state Grand Jury under a grant of transactional immunity. *Kastigar* v. *United States,* 406 U.S. 441 (1972); *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964). Bianco testified before that Grand Jury on five occasions from March through June of 1970.[8] Bianco points to several questions asked by the state District Attorney, David Katz, which involved the fact that Bianco had made certain expenditures, that he had received income from at least one source and that he had not filed federal tax returns. According to Bianco "[t]he very nature of these questions suggest [sic] circumstantial support that this testimony may have indeed provided the prime moving force for . . . [his] subsequent tax prosecution."[9]

Bianco points out that once he has demonstrated that he testified under a grant of immunity at a state Grand Jury with respect to the subject of a subsequent federal prosecution, the burden is on the government not only to

---

8 Bianco also appears to have testified before a federal Grand Jury, but he does not claim on this appeal that his appearance there under a grant of immunity was in any way misused.

9 Appellant's brief p. 43.

show that its evidence was not tainted by or derived from that testimony but also to show that its evidence was secured from independent legitimate sources. *Kastigar* v. *United States*, *supra*, 406 U.S. at 460; *Murphy* v. *Waterfront Comm'n*, *supra*, 378 U.S. at 79 n. 18.[10] At a hearing based upon Bianco's contentions, the government produced two witnesses, David Katz, the state District Attorney who had questioned Bianco in front of the Grand Jury, and Agent Nahmias, who was the case agent handling Bianco's investigation after the Grand Jury appearance. After hearing these two witnesses and after reviewing the government's entire file on the Bianco investigation, the district court allowed the case to proceed. We find that the district court's decision is supported by the evidence adduced at the hearing.

Agent Nahmias testified that he had not been aware of the fact that Bianco had testified before any Grand Jury until shortly before the instant hearing and that he had at that time still not seen the transcript of the state Grand Jury testimony. He further testified that he never had any contact with any state officials who had been involved in the Grand Jury proceedings. He testified that he conducted the investigation entirely on his own but conceded that there had been other federal agents connected with the Brooklyn Organized Crime Task Force with whom he had consulted during the course of his investigation and that when he began his investi-

10 At oral argument the government urged that if it proved that it had no access to the immunized testimony, it would be relieved of the burden of showing the independent legitimate sources of its evidence. Arguably, one could read both *Kastigar* and *Murphy* as having assumed that federal prosecutorial officials would be aware of the immunized testimony, and that given such knowledge, the non-use, alternative source burdens must then be applied. Given our view that the government met both *Kastigar* burdens in this case, we express no opinion on the government's argument.

gation in September, 1971, he consulted both FBI reports on Bianco and a report of a prior IRS Intelligence Division agent's investigation, which report and investigation were concluded significantly prior to Bianco's Grand Jury appearance.[11] District Attorney Katz testified that he had not had any conversation or discussions with any federal agents or authorities with respect to the Bianco Grand Jury appearance. He stated that the minutes of the Grand Jury proceeding had been kept under lock and that only he and a clerk in his office had access to the file. According to Katz's testimony, Bianco's appearance before the Grand Jury had been in connection with an investigation into a shooting and alleged industrial and labor racketeering in Brooklyn; he could not recall his reason for asking Bianco his source of income and whether or not he had filed tax returns. He was sure, however, that he had not been requested to ask those questions by federal authorities and that he had not communicated the results to them, nor to anyone else other than perhaps his superior or another district attorney.

It developed at the hearing that there was one possible link between the District Attorney's Office and the Brooklyn Organized Crime Task Force. That link was Detective John Capabianco, the liaison officer between the two offices. Katz testified, however, that he had not discussed Bianco's testimony with Capabianco. Further, near the close of the hearing, the government offered by letter to the court and to defense counsel to produce Capabianco and indicated

11 At defense counsel's suggestion and with the prosecution's full agreement, the district court examined the entire government file including the FBI reports *in camera* in an attempt to eliminate the need to call as witnesses other federal agents. The court indicated that there was nothing in the file indicating that the state Grand Jury proceedings were ever referred to. It should be noted that upon this Court's request, the file was sealed and transmitted to use for our complete examination.

that Capabianco would testify that he had not given any information from the Bianco Grand Jury proceedings to any federal authorities. The district court and the defense apparently felt that the government's representation was sufficient since the hearing ended with Katz's testimony.

The evidence as described was certainly sufficient to demonstrate not only that the federal prosecution made no use of Bianco's immunized testimony but also that it had no access to it or knowledge of its existence. While it might have been better for the government to have placed certain other IRS revenue and intelligence agents on the stand to testify as to their lack of knowledge of the testimony, Mr. Katz's testimony that he had not transmitted outside of his office any information about Bianco's appearance is sufficient to show no use by federal agents of any information garnered from that appearance. Admittedly, there was no intentionally erected "Chinese wall" between the state District Attorney's Office and the federal agents, *cf. United States* v. *Sapere*, Docket No. 75-1278 (2d Cir. February 13, 1976), slip op. 1891, but the record is sufficient to demonstrate that no information trickled through the natural barriers between the state and federal authorities.

The proof at the hearing was also sufficient to demonstrate that the government's tax prosecution arose from sources independent from the immunized testimony. At the Grand Jury, Bianco testified that he had not filed federal tax returns, that he made his living by betting on horses, that he had been in an unsuccessful business called "Easy Floorwaxing," that he paid $215 per month in rent on his apartment and that he had purchased an automobile from Kaplan Buick, which automobile was financed through Bankers Trust Company. He thus testified about non-filing, possible sources of taxable income and possible expenditures, all items of interest to the government's tax

prosecution. Agent Nahmias' testimony, together with the file examined by the district court, showed independent sources for all of these items.

Bianco claims that his admission that he had income from gambling and that he had not filed returns created the impetus for the present prosecution. The fact that Bianco had not been filing federal income tax returns since 1963, however, was nothing new to the IRS. Bianco had been the subject of a continuing intelligence division investigation long before his Grand Jury appearance. That initial investigation for the earlier tax years was closed with a report by Special Agent Langone, dated December 27, 1968, because that agent could not prove sufficient expenditures for those years to warrant prosecution. Agent Nahmias testified that, although that phase of the investigation had been closed, the IRS had maintained a continuous active interest in Bianco's status as a taxpayer. Bianco's claim that his admission before the Grand Jury of non-filing was the spur behind his tax prosecution seems to be disingenuous. Bianco's reference to gambling as a source of income was also information readily available to Agent Nahmias from a source not connected with the Grand Jury. Nahmias testified that after he was assigned to the case he examined Bianco's arrest record at the New York City Police Department. That record included an arrest for gambling. It should also be noted that when Agent Nahmias filed his report recommending prosecution, he did not include gambling as a source of Bianco's income.[12]

Similarly, evidence that the prosecution did use at Bianco's trial also came from sources other than the Grand Jury. Agent Nahmias' report indicated that Bianco's pos-

12 That source was never used by the prosecution in the presentation of its case.

sible sources of taxable income were from his loansharking activities and from his connection with the Easy Floorwaxing Company. The loansharking obviously came from a source other than the immunized testimony since that activity was never discussed at the Grand Jury.[13] Although Agent Nahmias did not specifically indicate where he had obtained the leads to the Easy Floorwaxing Company as a source of income, Agent Langone's file, closed prior to Bianco's Grand Jury appearance, contained references to that business activity. Finally, the Kaplan Buick and Bankers Trust Company references, used by the prosecution both as an expenditure and as a lead to Easy Floorwaxing, as well as references to rent paid by Bianco, were also contained in Agent Langone's pre-Grand Jury file. The FBI file also contained reports, dated prior to the Grand Jury appearance, in which the financing of Bianco's car through Bankers Trust Company was mentioned.

Thus it is clear that all of the information contained in Bianco's testimony which could have been used by Agent Nahmias in his investigation, with the possible exception of the gambling source of income which was never used as such by the prosecution, was already known to federal agents prior to that testimony. It is obvious that information possessed prior to the Grand Jury appearance is information derived from sources other than that appearance.[14]

---

13 Mr. Katz did ask Bianco if he was engaged in a loan business; Bianco replied in the negative.

14 Bianco also contends that the entire trial was prejudiced because the prosecuting attorney had read the transcript of the immunized testimony prior to trial, citing primarily *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973). Aside from the fact that Bianco failed to raise this contention below, we find *McDaniel* to be inapposite and the argument to be otherwise without merit. In *McDaniel* the prosecutor had read the entire transcript prior to his knowing that it had been immunized and prior to the indictment in that case having been filed. The *McDaniel*

Affirmed.

---

court concluded that the prosecutor's "use" of the testimony could include such things as "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States* v. *McDaniel*, *supra*, 482 F.2d at 311.

Here the prosecutor read the transcript only in preparation of the government's defense to Bianco's motion to dismiss. The investigation of the case was already complete and, as has been pointed out in the text, that investigation already contained and the prosecutor already knew everything in the testimony germane to the tax case. The only "use" to which the prosecutor could have put his reading of the transcript was to defend against the motion to dismiss.

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

No. 75-1632

In the Supreme Court of the United States

OCTOBER TERM, 1975

NICHOLAS L. BIANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1632

NICHOLAS L. BIANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1976 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence in this prosecution for willful failure to file income tax returns was sufficient to establish that petitioner's expenditures were derived from currently taxable income.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of five counts of willfully failing to file income tax returns for the years 1967 through 1971, in violation of 26 U.S.C. 7203. The district court sentenced him to consecutive terms of one-year imprisonment on each of the five counts, suspended sentence on the fifth count, and placed petitioner on probation for five years following completion of the four one-year sentences. The court also fined petitioner $10,000 on each of the five counts. The court of appeals affirmed (Pet. App. 1a-19a).

At trial, the government employed the cash expenditures method of proof. The evidence showed that petitioner had the following adjusted gross income and resulting tax due during the five prosecution years:

Year	Adjusted Gross Income	Tax Due
1967	$ 4,284.68	$ 547.00
1968	$ 5,924.99	$ 564.10
1969	$ 6,898.25	$ 757.60
1970	$ 8,916.49	$ 932.42
1971	$10,217.01	$1,035.87

These figures were computed from documented expenditures made by petitioner from such items as automobile payments, apartment rental, payments for utilities, insurance payments, doctor's and hospital bills, together with estimates of his food, clothing and personal care expenses based upon Bureau of Labor Statistics data

(R. 488a-495a).[1] In addition, Shayne Peters, petitioner's former girlfriend, testified that during the first eight months of 1967, petitioner entertained her at his expense at a number of fashionable night clubs on no less than 46 different occasions (R. 346a-370a).

The government also introduced evidence that showed specific sources of income. In a loan application made in 1968, and again in an insurance claim filed that same year, petitioner stated that he was self-employed at the Easy Floor Waxing Company (Pet. App. 8a-9a). In an application for a lease filed by petitioner in May, 1968, he stated that he was self-employed with income of $125.[2]

There was also evidence that petitioner had participated in a "loan-sharking" transaction in the spring of 1967 (Pet. App. 9a). In this particular transaction, petitioner loaned Joseph Rabinovich $10,000, on which he charged interest of $250 per week (an annual rate of 130 percent per year) (R. 439a-441a, 460a). Rabinovich made eight interest payments of $250 each and then paid off the full $10,000 amount (R. 441a-457a). While the payments were made to several individuals (R. 458a), Ms. Peters testified that petitioner had told her that he had made the loan to Rabinovich (R. 415a), that the interest was very high, and that he would arrange for another man to give Rabinovich enough money to take care of the loan (R. 372a-373a, 415a-416a). She further testified that Rabinovich had told her that petitioner "came up with the money to his office" (R. 416a).

---

[1] "R." refers to the two-volume record appendix filed in the court of appeals on behalf of petitioner.

[2] There was no indication of whether this was weekly or monthly income (Pet. App. 9a, n. 6).

In order to establish an appropriate starting point for the net worth computation, the government introduced evidence that petitioner had no accumulated assets as of January 1, 1967, the beginning of the prosecution years. The evidence was that there was an outstanding judgment for $436.40 entered in 1965 against petitioner that could not be collected in 1966 (Pet. App. 6a) and that a 1965 Buick automobile previously purchased by petitioner was repossessed in December, 1966 (R. 223a). For the limited purpose of establishing an opening net worth figure, the trial court also permitted the introduction of evidence that petitioner had not filed tax returns for 1963, 1964, and 1965, after having filed a return for 1962 showing a small amount of income (Pet. App. 5a-6a).

Finally, the investigation conducted by Special Agent Louis Nahmias failed to disclose any evidence that petitioner had accumulated any assets prior to the prosecution years (Pet. App. 4a-5a). Agent Nahmias checked everything at his disposal concerning sources of income (R. 280a, 294a-295a). He tried to find out if petitioner was employed and searched for specific items of income—"any kind, any type, whether it be salary or self-employment income" (R. 285a-288a).

For example, Agent Nahmias circularized approximately 100 banks, all of which responded that they had no accounts or assets in petitioner's name (Pet. App. 5a). He checked the official records in Kings County, New York, and could find no record of any real estate in petitioner's name (Pet. App. 5a). He also checked brokerage house records for possible securities owned by petitioner, as well as insurance brokers, physicians, schools, hospitals, banks, the telphone company, the electric company, petitioner's landlords and an automobile dealership in his search for assets and expenditures during the prosecution years (Pet. App. 5a; R. 282a-296a).[3] Agent Nahmias was unable to locate any accumulated assets or sources of nontaxable income (Pet. App. 5a).

At the close of the government's case, petitioner rested without presenting any defense or offering any evidence (Pet. App. 6a).

ARGUMENT

1. Under the well-established "cash expenditures" method of proof employed by the government in this prosecution, petitioner's taxable income was reconstructed by establishing the amounts he expended during each year in issue for purchases of goods and services, and deducting therefrom all expenditures made from assets accumulated prior to the prosecution period and from nontaxable income received during the year. See, *e.g.*, *Taglianetti* v. *United States*, 398 F.2d 558, 562 (C.A. 1). See also *United States* v. *Newman*, 468 F.2d 791 (C.A. 5), certiorari denied, 411 U.S. 905; *United States* v. *Penosi*, 452 F.2d 217 (C.A. 5), certiorari denied, 405 U.S. 1065. The accuracy of the computation requires the establishment with reasonable certainty of the taxpayer's accumulated assets on hand at the beginning of the prosecution year. *Taglianetti* v. *United States*, *supra*, 398 F.2d at 565; *United States* v. *Fisher*, 518

---

[3]Agent Nahmias also checked the records of the Probate Clerk in Providence, Rhode Island for possible inheritances. In his search for possible inheritances, the agent also interviewed petitioner's sister (Pet. App. 5a).

F.2d 836, 842, n. 7 (C.A. 2), certiorari denied, No. 75-418, December 16, 1975.[4]

Petitioner argues (Pet. 6) that the government's proof failed to establish with reasonable certainty his accumulated assets at the beginning of 1967, the first prosecution year. Specifically, he asserts (Pet. 6) that "the Government showed only that a relatively small judgment went uncollected and that a car had been repossessed" to establish that he had no significant assets in the pre-prosecution years. But petitioner's argument ignores the testimony of Agent Nahmias that his extensive investigation did not uncover any accumulated assets at the start of the prosecution years (R. 275a-327a). This testimony, coupled with the evidence petitioner cites and his failure to file tax returns for the years 1963 through 1965 (after having filed a return for 1962 showing a small amount of income), amply supports the conclusion of the court of appeals that "[t]he totality of this evidence clearly was sufficient for the jury to have concluded that Bianco had insufficient assets at the beginning of the prosecution period to

---

[4]In *Taglianetti* v. *United States, supra,* 398 F.2d at 562, the court distinguished the "net worth" method and the "cash expenditures" method as follows:

> The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.

have supported his expenditures in any of those years" (Pet. App. 6a).[5]

2. Petitioner also argues (Pet. 6-8) that the government did not establish an opening net worth for each year. But unlike the net worth method of prosecution, the cash expenditures method does not require proof of an opening net worth for each taxable year. All that is required is proof of the taxpayer's expenditures from nontaxable sources. See n. 4, *supra.*

Dupree v. *United States,* 218 F.2d 781 (C.A. 5), upon which petitioner relies (Pet. 6-7), is in accord with the decision below. In *Dupree,* the court held that in a cash expenditures case the government had to show expenditures *in excess* of the total of the funds available at the beginning of the year and the funds accumulated during the year which are disclosed on the tax return. This is precisely what was done here.

Agent Nahmias' investigation established that there were no assets in petitioner's name at the start of the first year and that no assets were accumulated in any prosecution year. Petitioner did not testify or produce any evidence at trial which would indicate that his expenditures in any year came from accumulated assets.

---

[5]As the court of appeals noted (Pet. App. 3a), petitioner made expenditures in each prosecution year far in excess of the amount which, had the money been derived from taxable income, would have required him to file returns for each year. In addition, the government offered evidence of a likely source for the money expended by petitioner during the prosecution years (Pet. App. 4a-9a). It was this evidence of a likely source, "together with the evidence of the government's fruitless search for sources of non-taxable income," which led the court of appeals to conclude (Pet. App. 9a) that all the evidence viewed as a whole was "sufficient to support an inference by the jury that the expenditures proved were attributable to currently taxable income."

Under these circumstances, the government's evidence that petitioner had no assets at the beginning of each year was sufficient to show that the expenditures in any one year came from funds acquired in that year.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys.

JUNE 1976.

DOJ-1976-06